UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Gregory Sheindlin,

Plaintiff,

-against-

James Brady,

Defendant.

1:21-cv-01124 (LJL) (SDA)

OPINION AND ORDER

STEWART D. AARON, United States Magistrate Judge:

This is a defamation case brought by Plaintiff Gregory Sheindlin ("Plaintiff" or "Sheindlin"), a New York attorney, against Defendant James Brady ("Defendant" or "Brady"), arising out of statements Brady made about Sheindlin in the aftermath of a New York state court action in which Sheindlin successfully represented one of Brady's adversaries in collecting a $1.7 million judgment against Brady (the "Enforcement Proceeding"). (*See* Compl., ECF No. 1.) Defendant recently effected the issuance of approximately 20 subpoenas in this action, targeting seven current or former New York State judges; three federal judges; three elected officials; two of Defendant's former attorneys; two real estate developers; one New York Post reporter; one of Defendant's former adversaries in one of the lawsuits underlying the Enforcement Proceeding; and that former adversary's counsel in that litigation. (*See generally* Def.'s 5/13/21 Ltr., ECF No. 67; Def.'s 5/20/21 Ltr., ECF No. 71.)

The Court has before it (1) a letter motion to quash filed by the New York State Office of Court Administration ("OCA") on behalf of the New York State Court judges (OCA Ltr. Mot., ECF No. 65); (2) a letter motion to quash filed by the New York County District Attorney's Office

("DANY") on behalf of District Attorney Cyrus R. Vance, Jr. ("DA Vance") (DANY Ltr. Mot., ECF No. 68); (3) two letters from Plaintiff generally opposing the subpoenas (Pl.'s 4/28/21 Ltr., ECF No. 53; Pl.'s 5/21/21 Ltr., ECF No. 74); (4) two letters from Defendant setting forth the purported justification for the subpoenas, which the Court construes as letter oppositions to the motions to quash (Def.'s 5/13/21 Ltr.; Def.'s 5/20/21 Ltr.), and another letter from Defendant discussing purported admissions made by Plaintiff at deposition (Def.'s 5/24/21 Ltr., ECF No. 75); and (5) a May 11, 2021 Order from District Judge Liman stating that his chambers had received a call and an email "from a retired justice of New York State Supreme Court informing the Court that she has been served with a subpoena in this case and asserting that it is improper" and ordering "that Defendant shall not serve any further subpoenas pending further order of the Court or take any action to enforce any subpoenas already served pending further order of the Court" and that "[c]ompliance with any subpoenas served by Defendant is stayed pending further order of the Court." (5/11/21 Order, ECF No. 60.) On May 17, 2021, Judge Liman referred this case to me for general pretrial purposes. (Order of Ref., ECF No. 70.)

After careful review of the record, for the reasons discussed below, the Court hereby GRANTS both letter motions (ECF Nos. 65 & 68) and quashes the subpoenas issued against the current or former New York state judges and DA Vance. The Court further quashes, *sua sponte*, the subpoenas issued against United States District Judges Paul Engelmayer and Lewis Liman, United States Magistrate Judge Ona Wang, New York Governor Andrew Cuomo, New York Attorney General ("NYAG") Letitia James and New York Post reporter Kathianne Boniello. The Court lifts the stay against enforcement of and compliance with the remaining subpoenas, and will resolve disputes regarding those subpoenas as and when they are brought before the

Court. The Court leaves in place the stay against service of further subpoenas pending further Order of the Court; Defendant shall obtain leave of Court before issuing any other subpoenas.

RELEVANCE OF DISCOVERY SOUGHT AND SUBSTANTIVE LEGAL STANDARDS

Under Federal Rule of Civil Procedure 26(b)(1), "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). "The party seeking discovery bears the initial burden of proving the discovery is relevant." *In re Subpoena to Loeb & Loeb LLP*, No. 19-MC-00241 (PAE), 2019 WL 2428704, at *4 (S.D.N.Y. June 11, 2019) (citation omitted).

Federal Rule of Civil Procedure 45(a) permits a party to request and serve on a non-party a subpoena seeking production of documents, and Rule 45(d) permits a non-party served with a subpoena to move to have the subpoena quashed. *See* Fed. R. Civ. P. 45(a), (d)(3). "Motions to quash under Rule 45 are entrusted to the sound discretion of the district court." *Universitas Educ., LLC v. Nova Grp., Inc.*, No. 11-CV-01590 (LTS) (HBP), 2013 WL 57892, at *2 (S.D.N.Y. Jan. 4, 2013) (citations and internal quotation marks omitted).

"The relevance standards set out in Federal Rule of Civil Procedure 26(b)(1) apply to discovery sought from non-parties." *Loeb*, 2019 WL 2428704, at *4; *see also* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2459 at n.12 (3d ed. 2020) (collecting cases). "On a motion to quash, the party issuing the subpoena must demonstrate that the information sought is relevant and material to the allegations and claims at issue in the proceedings." *Loeb*, 2019 WL 2428704, at *4 (internal quotation marks, brackets and citation omitted). "A subpoena that pursues material with little apparent or likely relevance . . . is likely

to be quashed as unreasonable even where the burden of compliance would not be onerous." *Id.* (citation omitted).

To prevail in a defamation claim under New York law, a plaintiff must show: "(1) a false statement about the plaintiff; (2) published to a third party without authorization or privilege; (3) through fault amounting to at least negligence on [the] part of the publisher; (4) that either constitutes defamation *per se* or caused special damages." *Evliyaoglu Tekstil A.S. v. Turko Textile LLC*, No. 19-CV-10769 (LJL), 2020 WL 7774377, at *3 (S.D.N.Y. Dec. 30, 2020) (citation omitted). Because falsity is a necessary element, it is "fundamental that truth is an absolute, unqualified defense to a civil defamation action" under New York law. *Guccione v. Hustler Magazine, Inc.,* 800 F.2d 298, 301 (2d Cir. 1986).

Here, the gravamen of Plaintiff's defamation claims is that Defendant falsely has stated that Plaintiff "stole $1.7 million dollars from him." (Complaint ¶ 63; *see also id.* ¶¶ 69(g), 69(h), 74, 84.) Defendant invokes the defense of truth. (*See* Pl.'s 5/20/21 Ltr. at 2.) As relevant to this litigation, the gravamen of Defendant's position is that it is in fact true that Plaintiff "stole" his money, because Plaintiff effected the transfer of Defendant's money by fraudulently misrepresenting the July 2015 jury verdict in a state court lawsuit captioned *IGS Realty v. Brady*, Index No. 603561/2009 (N.Y. Sup. Ct. filed Dec. 2, 2009) ("*IGS Realty I*"), a case presided over by Justice Barry Ostrager. (*See*, *e.g.*, Pl.'s 5/20/21 Ltr. at 2, 4; *see also* Def.'s Am. OSC Opp. Ex. 2, ECF No. 14-2 (a copy of the "Jury Interrogatory Sheet" at issue).)

Thus, here, the scope of discovery as to Defendant's truth defense extends to nonprivileged material relevant to whether Plaintiff fraudulently misrepresented the 2015 jury verdict in *IGS Realty I*.

DISCUSSION

Below, the Court discusses in turn the subpoenas Plaintiff has requested vis-à-vis different categories of third parties.

I. The Subpoenas To The State Court Judges Are Quashed

There is no valid basis for Defendant's subpoenas to the New York state court judges. "A judge may only be required to testify if he [or she] (1) possesses factual knowledge, (2) that knowledge is highly pertinent to the jury's task, and (3) he [or she] is the only possible source of testimony on the relevant factual information." *U.S. v. Roth*, 332 F. Supp. 2d 565, 568 (S.D.N.Y 2008), *aff'd sub nom., U.S. v. St. John*, 267 F. App'x 17 (2d Cir. 2008). In the present case, the *IGS Realty I* jury resolved the factual questions before it and rendered its verdict by responding to Jury Interrogatories. There is no factual knowledge the state court judges could possibly possess that would be relevant to this Court's interpretation of the *IGS Realty I* jury's verdict.[1] In any event, Defendant certainly has not identified any such knowledge—let alone knowledge about which any of these judges is the only possible source of testimony.

[1] Moreover, only one of the state court judges likely has any first-hand knowledge about the *IGS Realty I* jury verdict, as only Justice Ostrager presided over that trial. Defendant's allegations regarding some of the state court judges appear to relate to different lawsuits, which have no bearing upon the defamation action at bar. (*See*, *e.g.*, Def.'s 5/20/21 Ltr. at 3 (asserting that New York Chief Judge DiFiore "must still admit that Defendant never lost the air rights litigation" and that Judge Samuels "said to [him] before a trial that she was going to make it that [he] could only lose in a case against a law firm named Wager Davis"); *id.* at 6 (contending that a "February 11, 2010 Decision governs over the lower [Justice] Shirley Kornreich[']s July 15, 2014 Supreme Court Decision in the air rights case").) *See generally Brady v. Berman*, No. 18-CV-08459 (VEC) (BCM), 2019 WL 4546535, at *1-3 (S.D.N.Y. Aug. 2, 2019) (distinguishing between the "air rights litigation" and the "personal guarantee litigation," the latter of which is the action at issue here).

Thus, in an exercise of its discretion, the Court grants the letter motion at ECF No. 65, and the subpoenas issued against the current and former New York state judges are QUASHED.[2]

II. The Subpoenas To The Federal Judges Are Quashed

The same logic applies to the federal judges. Defendant seeks to justify his subpoenas to United States District Court Judges Engelmayer and Liman and United States Magistrate Judge Wang on the basis that each of these jurists is "falsely (or erroneously) stating what a State Court Jury found." (*See* Pl.'s 5/13/21 Ltr. at 1.) But whatever these jurists may have stated—in each instance, several years after the jury verdict in question—is their opinion based on legal analysis, not unique factual knowledge. Thus, in its discretion, the Court *sua sponte* ORDERS that these subpoenas are QUASHED.[3]

III. The Subpoenas To The Elected Officials Are Quashed

Courts only permit the deposition of a high ranking government official upon a showing that: "(1) the deposition is necessary in order to obtain relevant information that cannot be obtained from any other source and (2) the deposition would not significantly interfere with the ability of the official to perform his governmental duties." *Marisol A. v. Giuliani*, No. 95-CV-10533 (RJW), 1998 WL 132810, at *2 (S.D.N.Y. Mar. 23, 1998). "[W]hen applying the first prong,

[2] The Court interprets the letter motion at ECF No. 65 as seeking to quash the subpoena served on retired New York state court Justice Kornreich (in addition to the subpoenas served on sitting New York state court jurists). In the alternative, for the same reasons provided above, the Court *sua sponte* ORDERS that the subpoena served on retired New York state court Justice Kornreich is QUASHED.

[3] The Court has the authority to *sua sponte* quash a subpoena. *See Sanchez Y Martin, S.A. de C.V. v. Dos Amigos, Inc.*, No. 17-CV-01943 (LAB), 2018 WL 2387580, at *4 (S.D. Cal. May 24, 2018) ("Even assuming *arguendo* Defendant's objections had been waived, because the subpoena seeks information not relevant to the claims or defenses in this case, the Court would still not require compliance with the subpoena."); *see also* Fed. R. Civ. P. 26(b)(2)(C) (allowing a court to issue a protective order on its own initiative to limit discovery if it is outside scope permitted by Rule 26(b)(1)).

courts only permit the deposition of a high ranking government official if he has unique personal knowledge that cannot be obtained elsewhere." *Id.* at *3.

Here, Defendant has not shown any unique personal knowledge held by any of the three elected officials he seeks to subpoena that is relevant to Plaintiff's claims or Defendant's defenses. About DA Vance and NYAG James, Defendant states:

> The Testimony of Cyrus Vance and Letitia James is needed because they have personal knowledge of the fact that for the sake of politically connected people former Judge Kornreich unlawfully rewrote the contract description of my commercial apartment to void [w]hat my contract said on its face.
>
> Cyrus Vance and Letitia James also are fully aware that there was never a jury finding that the personal guarantees were enforceable and they are witnesses to this fact that it is untrue that a jury found the personal guarantees we[r]e enforceable as is asserted only by [Judge Liman], Judge Engelmayer and Magistrate Wang[.]

(Pl.'s 5/13/21 Ltr at 3.)

The knowledge Defendant cites in the first of these two paragraphs is not relevant to the claims and defenses in this action. The action over which Justice Kornreich presided predated the action that generated the jury verdict at issue here.[4] With regard to the second paragraph, while it is not clear to the Court what it means to be "witness[]" to a "fact" that something is "untrue," Defendant has not identified any relevant, unique personal knowledge held by either of these individuals in connection with the jury verdict at issue—nor offered any plausible explanation of how they could have come to possess such knowledge.[5]

[4] *See also* Def.'s 5/20/21 Ltr. at 7 (arguing that DA Vance and NYAG James must answer certain questions concerning a 2014 decision of Justice Kornreich, which she entered in the so-called "air rights litigation," as opposed to the "personal guarantee litigation" at issue here).

[5] Defendant's May 20 letter further asserts in conclusory fashion that DA Vance and NYAG James "know that [Plaintiff] stole more than $1.7 million dollars from [Defendant]." (Def.'s 5/20/21 Ltr. at 2.) However, Defendant provides no basis for this assertion.

About Governor Cuomo, Defendant says the following:

> The testimony of Andrew Cuomo is needed because it is undisputed by [Justice] Ostrager and [Justice] Marin that it was Andrew Cuomo who had these two judges take over my years old cases to perform retaliatory acts against me for relentlessly fighting to expose the RICO Manor [*sic*] in which he controls the Courts and other institutions.

(Def.'s 5/13/21 Ltr. at 4.) This unrelated grievance has no relevance to whether a particular jury verdict found X or found Y.

Thus, in an exercise of its discretion, the letter motion at ECF No. 68 is GRANTED, and the subpoena to DA Vance is QUASHED; further, the Court *sua sponte* ORDERS that the subpoenas to Governor Cuomo and NYAG James are QUASHED.

IV. The Subpoena To The New York Post Reporter Is Quashed

About the subpoena issued against New York Post reporter Kathianne Boniello, Defendant states:

> The testimony of New York Post reporter Kathianne Boniello is needed by Defendant in preparing his defamation counterclaim against Gregory Sheindlin. During his May 4, 2021 deposition Mr. Sheindlin and his attorney Mr. Sussman both claimed they never even communicated with Ms. Boniello which totally conflicts with what Ms Boniello wrote in her April 3, 2021 New York Post news story.

(Def.'s 5/13/21 Ltr. at 4.)

At present, Defendant has no defamation counterclaim in this action. Since Defendant has not demonstrated what information Ms. Boniello could possess that would be relevant to *Plaintiff's* claim that *Defendant* defamed *Plaintiff*, or to Defendant's defense that his statements about Plaintiff were true, the Court *sua sponte* ORDERS that the subpoena to Ms. Boniello is QUASHED.

V. With Regard To The Remaining Subpoenas, The Stay Is LIfted

On the present record, the Court declines to rule on the remaining subpoenas *sua sponte*. Rather, the Court will lift the temporary stay that Judge Liman imposed against enforcement of and compliance with those subpoenas, and the Court will resolve disputes regarding those subpoenas as and when they are brought before the Court.

CONCLUSION

By reason of the foregoing, it is hereby ORDERED, as follows:

1) The letter motions to quash the subpoenas issued against the present and former New York State judges (ECF No. 65) and DA Vance (ECF No. 68) are GRANTED, and those subpoenas are QUASHED;

2) The subpoenas issued against District Judges Engelmayer and Liman, Magistrate Judge Wang, Governor Cuomo, NYAG James and New York Post reporter Kathianne Boniello are QUASHED;

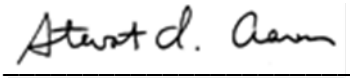
3) The stay against enforcement of and compliance with Plaintiff's remaining subpoenas is lifted, and the Court will resolve disputes regarding those subpoenas as and when they are brought before the Court; and

4) The Court leaves in place the stay against service of further subpoenas pending further Order of the Court; Defendant shall obtain leave of Court before issuing any other subpoenas.[6]

[6] Pursuant to Rule 26(c)(1) of the Federal Rules of Civil Procedure, in order to protect non-parties from annoyance, embarrassment, oppression or undue burden or expense, the Court enters this Protective Order requiring Defendant to first obtain leave of Court before issuing any further subpoenas.

SO ORDERED.

Dated: New York, New York
May 24, 2021



STEWART D. AARON
United States Magistrate Judge